CASE NO. 85-510

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

GERTIE SIMMONS and THOMAS BAKER,
PETITIONERS,

v.

THE CAMDEN COUNTY BOARD
OF EDUCATION, ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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75pl

QUESTIONS PRESENTED FOR REVIEW

1.) Whether the ruling of the court of appeals is in conflict with the directive of this Court in McDonnell Douglas Corporation v. Green, 411 U.S. 805(1973) regarding the permissible circumstances under which an employer may rely upon employee misconduct as a basis for adverse action under Title VII of the Civil Rights Act of 1964?

2.) Whether, in cases arising under Title VII of the Civil Rights Act of 1964 where the employee proves, inter alia, that his infractions which were relied upon as the reason for the adverse action were treated more severly than were comparable infractions by other employees, the burden of proof upon the employer in responding to such evidence is heavier than merely articulating the reason shown to have been selectively used?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit, whose judgment is sought to be reviewed, are Petitioners Gertie Simmons and Thomas Baker and Respondents Camden County Board of Education; David Rainer, Superintendent of Schools for Camden County; Peter Baker, Principal of the Camden County High School; and LeRoy Reed, Tilden Norris, Gerald Crummey, Patty Ross, and J. L. Stanfield, members of the Camden County Board of Education.

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In The

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GERTIE SIMMONS and THOMAS BAKER,

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THE CAMDEN COUNTY BOARD
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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The Petitioners, Gertie Simmons and Thomas Baker, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above

captioned case on April 15, 1985, and the order denying the Petition for Rehearing and Suggestion for Rehearing En Banc on June 27, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 757 F.2d 1187(11th Cir. 1985), a copy of which is included in the appendix hereto at pages A-1 through A-9. The findings of fact and conclusions of law of the United States District Court for the Southern District of Georgia where announced from the bench and therefore not published, but a copy of the same is included in the appendix at pages A-10 through A-49.

JURISDICTION

The judgment of the Court of Appeals

was entered on April 15, 1985. The order of that court denying the Petition for Rehearing and Suggestion for Rehearing En Banc was entered on June 27, 1985. Title 28 of the United States Code, Sec. 1254(1) confers jurisdiction upon the Supreme Court of the United States to review the judgment in question by writ of certiorari.

STATUTORY PROVISION INVOLVED

This case involves Sec. 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-3, which provides:

> (a) Discrimination on account of opposition to unlawful practices or participation in investigation, proceeding, or hearing. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an unemployment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,

> to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

STATEMENT OF THE CASE

Petitioners filed this action in the federal district court on September 24, 1982. Therein, they alleged, inter alia, that they were unlawfully suspended and subsequently discharged from their employment as school teachers with Respondent Board of Education in retaliation for their filing of complaints of discrimination with the Office of Civil Rights of the then Department of Health, Education and Welfare. In their action Petitioners

claimed that such retaliation was in violation of Sec. 704(a) of Title VII of the Civil Rights Act of 1964.

Applying the three-pronged test[1] of Whatley v. Metropolitan Atlanta Rapid Transit Authority, 632 F.2d 1325(5th Cir., Unit B, 1980), the district court found Petitioners established a prima facie case that they were discharged from their employment with a retaliatory intent. (A-42 thru 43) The court of appeals noted with approval that Petitioners had indeed made out a prima facie case of retaliation. Simmons v. Camden County Board of Education, 757

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[1]Under this test which is used in retaliation cases, the plaintiff must establish: (1) a statutorily protected expression; (2) an adverse action; and (3) a causal link between participation in the protected activity and the adverse action. See Whatley, 632 F.2d at 1328.

F.2d 1187, 1189 (11th Cir. 1985) and A-9.

Moreover, Petitioners offered evidence found credible by the district court of numerous instances where there was misbehavior or malfeasance by other teachers employed by Respondents "similar in nature to the acts for which" Petitioners were discharged, and where other teachers had "received more lenient disciplinary treatment from" Respondents than had Petitioners. (A-36) Concerning this evidence the court of appeals stated:

> The plaintiffs did introduce considerable documentary evidence of instances of poor performance and misconduct in varying degrees of severity among other faculty members, which did not result in termination or suspension. This fact was specifically noted by the district court in its findings of fact.
>
> * * *
>
> The Court did find that plaintiffs'

> infractions were in fact dealt with more severely than were comparable infractions by other faculty members.

Simmons, 757 F.2d at 1188-89 and A-3 thru A-4.

As noted by the court of appeals, the reason advanced by Respondents for Petitioners' discharge was that the latters' infractions "were perceived to be a part of an ongoing pattern of conduct manifesting disrespect and open defiance toward the supervisory authority ...". Simmons, 757 F.2d at 1189 and A-5. Both the district court and the court of appeals read McDonnell Douglas v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) to place upon Respondents only the burden of articulating the aforementioned reason for discharge. Simmons, 757 F.2d at

1189 and A-43. Thus, notwithstanding Petitioners' prima facie case of retaliatory intent and their showing that they were treated differently for comparable infractions than numerous other faculty members, the district court held that Respondents "successfully rebutted [Petitioners'] allegations by articulating a legitimate, non-discriminatory reason" for the discharge of Petitioners. (A-42 thru 43).

REASONS FOR GRANTING THE WRIT

THE RULING OF THE COURT OF APPEALS IS IN CONFLICT WITH THE RULING OF THIS COURT IN McDONNELL DOUGLAS CORPORATION v. GREEN, 411 U.S. 805(1973).

In McDonnell Douglas v. Green, 411 U.S. 805(1973), the plaintiff, as did Petitioners here, made both discrimina-

tion and retaliation claims under Title VII. Id., 411 U.S. at 796. The defendant-employer in McDonnell Douglas contended that the plaintiff was not rehired on account of his participation in disruptive protest activities directed at the defendant. Id., at 794-95. Thus, the reason offered by the defendant in McDonnell Douglas for its taking adverse action was very similar to the reasons advanced by Respondents here, i.e. disruptive employee behavior.

This Court in McDonnell Douglas set forth for the first time the basic allocation of the burden of proof in cases arising under Title VII, including the elements of a prima facie case in disparate treatment cases; id., 411 U.S. at 802, and the defendant's burden of producing "some legitimate, non-

discriminatory reason for the employee's rejection. Id., at 804. Then, this Court went on to spell out how trial courts should treat credible evidence which demonstrates that the defendant's reaction to an employee's misconduct is disparate, in comparison with its normal reaction to the same or similar misconduct.

> Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by Sec. 703(a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing will be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired. Petitioner may

> justifiably refuse to rehire one who has engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

Id., 411 U.S. at 804. (Emphasis added)

In the instant case Petitioners' evidence, which was found to be credible evidence by the district court, demonstrated that their infractions "were in fact dealt with more severely than were comparable infractions by other faculty members." Simmons, 757 F.2d at 1188-89 and A-4. Thus, the facts in this case show that Respondents did not, as McDonell Douglas directs, treat comparable misconduct by their employees in an even-handed, non-discriminatory manner. Instead, Respondents reacted more harshly to the misconduct of Petitioners than to the misconduct of other employees who had not filed charges

of discrimination against Respondent Board of Education.

As shown above McDonnell Douglas does not allow an employer to discharge for violation of a rule unless that "criterion is applied alike to members of all races."[2] However, in ruling against Petitioners, both the district court and the court of appeals reasoned that notwithstanding this clear evidence that Respondents did not discipline other employees in the way in which it disciplined Petitioners, judgment in

[2]In retaliation cases this aforementioned standard from McDonnell Douglas would prohibit an employer from taking adverse action based upon violation of a work criterion, unless the employer enforced the criterion against employees who had not participated in an activity protected by Sec. 704(a) of Title VII.

Respondents' favor was appropriate. These rulings by the lower courts in this case are in direct conflict with the aforementioned directive of McDonnell Douglas concerning the permissible circumstances under which an employer may lawfully rely upon employee misconduct as a basis for adverse action under Title VII.

In reaching this erroneous legal conclusion, both the district court and the court of appeals relied upon Texas Department of Community Affairs v. Burdine, 450 U.S. 248(1981). Simmons, 757 F.2d 1189 and A-6, A-40. From that holding the lower courts reasoned that even though Petitioners' infractions were dealt with by Respondent more severly than the infractions of others, Respondents were only required to respond

to Petitioners' case by articulating the reason for discharge which had previously been shown to have been selectively used against Petitioners. Simmons, 757 F.2d 1189 and A-43. Furthermore, the courts in this case then reasoned that Burdine required judgment for Respondents unless Petitioners proved by a preponderance of the evidence that the reason given by Respondents for the discharge was pretext. Id.

There is language in Burdine and several post-Burdine rulings by this Court which may be read to stand for the rule applied by the lower courts in this case. "The plaintiff retains the burden of persuasion. She must now have the opportunity to demonstrate that the pro-offered reason was not the true reason for the employment decision." Burdine,

450 U.S. at 256. See also United States Postal Board of Governors v. Aikens, 460 U.S. 711(1983). However, neither Burdine nor the cases that follow it were intended to alter the McDonnell Douglas holding; instead, those decisions follow and implement the teachings of McDonnell Douglas. Thus, the aforementioned directive in McDonnell Douglas, which prohibits the selective use of employee misconduct as a basis for discharge, is still the controlling law, notwithstanding the aforementioned language in Burdine. Such a reading of McDonnell Douglas is especially appropriate in light of the fact that neither Burdine nor the post-Burdine cases in this Court dealt, as did McDonnell Douglas, with circumstances in which the employer's articulated reason for taking

adverse action was shown to have been selectively applied on the basis of impermissible classifications.

CONCLUSION

This case raises an important issue concerning the proper allocation of the burden of proof where, in addition to a prima facie case, the plaintiff demonstrates that the infractions for which he was discharged were treated more severly than were comparable infractions committed by fellow employees. In such circumstances the lower courts in this case read McDonnell Douglas and Burdine to require Respondents merely to articulate the reason for discharge, albeit the reason is the one previously shown to have been selectively used by Respondents.

This petition for writ of certiorari should be granted in order to allow review of this important issue. In particular, this Court should consider whether evidence of selective use of employee misconduct by an employer should place upon the employer a heavier burden of proof than mere articulation of the discredited reason. For example, should the defendant in cases of this kind be required to go forward with evidence to explain why it has treated comparable misconduct in a disparate manner, i.e., evidence which demonstrates the underlying reason why the infraction in question was in fact more serious in nature than the comparable infractions pointed to by the plaintiff's evidence.

Certainly, this Court has in other settings placed a heavier burden of

rebuttal on the defendant than the burden imposed upon a defendant by Burdine where, as here, the plaintiff's evidence is strongly indicative of illegality by the defendant. See Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977)(burden of rebuttal shifted to defendant once plaintiff proves constitutionally protected activity was a motivating factor for adverse action). Cf., Teamsters v. United States, 431 U.S. 324(1977) and Griggs v. Duke Power Co., 401 U.S. 424(1971)(statistical showing of adverse impact of employment practice shifts burden of rebuttal to the defendant). Because evidence of the disparate treatment by an employer of comparable infractions is highly indicative of retaliatory intent, this Court should likewise consider whether placing

a heavier burden of rebuttal upon defendants in such cases would more likely provide for an accurate determination of the truth at trial.

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Gertie SIMMONS and Thomas Baker,
Plaintiffs-Appellants,

v.

CAMDEN COUNTY BOARD OF EDUCATION,
et al., Defendants-Appellees.

No. 84-8309.

United States Court of Appeals,
Eleventh Circuit

April 15, 1985

Before RONEY and HILL, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

The plaintiffs are former teachers at Camden County High School who were suspended from their positions on February

11, 1977, and subsequently discharged for cause. In the summer of 1976, both had filed charges of racial discrimination against the school district with the Office of Civil Rights of the then Department of Health, Education and Welfare ("HEW"). Following a timely complaint to the Equal Employment Opportunity Commission ("EEOC"), the plaintiffs filed this suit alleging that they were discharged in retaliation for the filing of the discrimination complaints with HEW, in violation of Sec. 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-3(a).

Following a bench trial, the district court made findings of fact and conclusions of law. The court concluded that although the plaintiffs had established a

prima facie case of retaliation, they did not prove by a preponderance of the evidence that the defendants' articulated reasons for discharging them were merely a pretext for discrimination.

The plaintiffs contend that the district court's findings of fact concerning disparate treatment and motive were inadequate and clearly erroneous. They also contend that the district court erred in allocating to them the burden of disproving the defendants' articulated reasons for terminating the plaintiffs, in light of what the plaintiffs insist was direct evidence of discriminatory animus. We do not agree, and we therefore affirm.

The plaintiffs did introduce

considerable documentary evidence of instances of poor performance and misconduct in varying degrees of severity among other faculty members, which did not result in termination or suspension. This fact was specifically noted by the district court in its findings. In our opinion, the district court adequately noted the significance of the plaintiffs' evidence.

[1] The plaintiffs missed the point of the district court findings and conclusions. The court did find that the plaintiffs' infractions were in fact dealt with more severely than were comparable infractions by other faculty members. This is precisely the fact which the plaintiffs were seeking to prove. However, the court found that the

disparate treatment was not in response to the filing of the complaints with the HEW. Rather, it accepted the defendants' testimony that the plaintiffs were suspended and discharged because their infractions were perceived to be part of an ongoing pattern of conduct manifesting disrespect and open defiance toward the supervisory authority of the school principal, Peter Baker, wholly apart from the filing of the complaints. Peter Baker is plaintiff Thomas Baker's brother. In 1976, he, too, had filed discrimination charges against the school system, which he later withdrew. After examining the record, we conclude that these findings were not clearly erroneous. See Pullman Standard v. Swint, 456 U.S. 273, 289-90, 102 S.Ct. 1781, 1790-91, 72 L.Ed.2d 66 (1982).

[2-4] The plaintiffs also contend that the burden should have been on the defendants to prove that the plaintiffs would have been suspended and discharged even if they had not filed the charges.

It is true that the allocation of proof prescribed in McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), does not apply in a case where substantial direct evidence of discrimination was a significant fact in an employment decision. Bell v. Birmingham Linen Service, 715 F.2d 1552, 1557 (11th Cir.1983).

Here, however, there was only circum-

stantial evidence of retaliation, chiefly in the form of remarks by David Rainer, the superintendent of schools, demonstrating his displeasure about the HEW investigation and his association of plaintiff Thomas Baker with the investigation. In a retaliatory discharge case under Sec. 704(a), where there is no direct evidence of retaliation, we have held that a plaintiff may make a prima facie case of retaliation by proving:

> (1) that there was a statutorily protected participation, (2) that an adverse employment action occurred, and (3) that there was a causal link between the participation in the adverse employment action.

Whatley v. Metropolitan Atlanta Rapid Transit Authority, 632 F.2d 1325, 1328

(5th Cir., Unit B, 1980).

We do not construe the "causal link" in the Whatley formula to be the sort of logical connection that would justify a prescription that the protected participation in fact prompted the adverse action. Such a connection would rise to the level of direct evidence of discrimination, shifting the burden of persuasion to the defendant. Rather, we construe the "causal link" element to require merely that the plaintiff establish that the protected activity and the adverse action were not wholly unrelated.

We believe that the plaintiffs' evidence of Rainer's feeling about the HEW investigation, his knowledge of

Thomas Baker's involvement and Peter Baker's knowledge of both plaintiffs' involvement in the investigation did no more than establish the necessary "causal link" between their complaints and their termination, as we have defined that term. This evidence enabled them to overcome the initial hurdle of having to make a prima facie showing of retaliation. It did not, however, relieve them of the burden of overcoming any legitimate reasons articulated by the defendants. As noted above, the district court concluded that the plaintiffs failed to meet that burden, and that finding is not clearly erroneous.

AFFIRMED.

Gertie SIMMONS and Thomas BAKER,
Plaintiffs,

v.

CAMDEN COUNTY BOARD OF EDUCATION,
et al., Defendants.

CIVIL ACTION NO. 282-192.

United States District Court for the
Southern District of Georgia
Brunswick Division

BENCH TRIAL
FINDINGS OF FACT & CONCLUSIONS OF LAW
HONORABLE A. A. ALAIMO, CHIEF JUDGE,
PRESIDING

March 1, 1984

THE COURT: The reason I asked you to come back this morning is that I did not feel there was any purpose to be served in delaying the making of my findings and

and that the sooner you all know what they are, the better off everybody is going to be.

These two claims brought by two black school teachers against their former employer, the Camden County, Georgia, School Authorities, pursuant to Title VII -- that is, 42 United States Code, 2000(e) and following -- as well as Title 42, Sections 1981 and 1983, came on for trial before the Court in a bench trial.

Following the reception of evidence by all parties and arguments of counsel, the Court makes the following findings:

FINDINGS OF FACT

(1) The Court has jurisdiction over this civil action by virtue of its authority to hear cases presenting a federal question, pursuant to 28 United

States Code, Section 1331, and its authority to hear cases brought in order to redress any deprivation of civil rights, pursuant to Section 1343 of Title 28.

(2) The Plaintiffs, Gertie Simmons and Thomas Baker, are two black, former school teachers who were employed by the Camden County School District up through February of 1977.

(3) The Defendants Leroy Reed, Tilden Norris, Gerald Crummey, Patty Ross, and Chairman J. L. Stanfield are members of the Camden County School Board and were members in 1977.

(4) Defendant David Rainer was the Superintendent of the Camden County School District in 1977 and at all times during which the incidents underlying this action occurred.

(5) Defendant Peter Baker, a black,

is the brother of Plaintiff Thomas Baker and was the Principal of the Camden County High School in 1977 and at all times during which the incidents underlying this action occurred.

(6) Gertie Simmons and Thomas Baker filed this suit under Title VII of the 1964 Civil Rights Act and, as I stated previously, Title 42 United States Code, Section 2000(e), and following, and the Civil Rights Acts of 1866 and 1871, being 42 United States Code, Sections 1981 and 1983.

(7) At trial, Plaintiffs narrowed their claims to contentions that the Defendants discriminated against them by suspending them from their teaching duties in 1977 and then refusing to renew their 1977-78 employment contracts in retaliation for Plaintiffs filing of complaints with the Department of Health,

Education and Welfare, alleging unlawful race and sex discrimination practices in the Camden County School System. Additionally, Plaintiff Simmons contended that as a result of desegregation, she was demoted from a position which was the equivalent of an Athletic Director, and that pursuant to the mandate of the case of Singleton against Jackson Municipal Separate School District, 419 F.2d 1211, which was later reversed in part in 396 U.S. 290, and the pertinent holdings reaffirmed in 425 F.2d 1211 by the Fifth Circuit, when the position of Athletic Director or Football Coach was open at the desegregated high school that she should have been, but was not, offered that position.

(8) By order of this Court on September 30th, 1983, the Defendants' Motion for Summary Judgment was granted

in part -- that is, Plaintiffs' claims for damages under Sections 1981 and 1983 of Title 42 were found barred by the applicable statute of limitations, as were Plaintiff Simmons' claims for damages and back pay under her Singleton claim. Plaintiffs' claims for relief were, thus, narrowed to reinstatement and back pay under their Title VII claims and any appropriate injunctive relief.

(9) Gertie Simmons was first employed by the Defendants in 1964. She held a Bachelor of Science Degree in Physical Education from Allen University in South Carolina and a Master's Degree in Physical Education from Florida A&M University. She had also received certification in Driver's Education from Savannah State College in Savannah, Georgia.

(10) She was employed as the women's

basketball coach at Ralph Bunche High School, which was the district's black high school until 1970-71, at which time the school system was ordered by the Federal Court to desegregate.

(11) For a short period, she elected to remain at Ralph Bunche which was temporarily made into a desegregated junior high school.

(12) Later when Ralph Bunche School was closed, Ms. Simmons transferred and began teaching at the desegregated Camden County High School in January of 1971. From that time until the commencement of the 1976-77 school year, her teaching responsibilities were Physical Education and Driver's Education, and until the Fall of 1975, she had been Cheerleader Sponsor; and at that time, she was injured in an auto accident and was out for several months, and another teacher

was assigned the sponsorship of cheerleaders for the balance of the 1975-76 school year.

(13) Upon Ms. Simmons returning to her teaching duties in 1976, she voluntarily declined to re-accept the position of Cheerleader Sponsor.

(14) In the Spring of 1976, the Camden County School Board hired Ralph Pierce, a white male, as Athletic Director/Head Football Coach at Camden County High School. Ms. Simmons was not notified that the position was open, nor was she considered for the job.

(15) The position of Athletic Director/Head Football Coach has always been held by a single individual in the Camden County School District from at least 1965 to the present. In addition, the job descriptions contained in the Official Policies and Procedures Manual

for the Camden County School District have always listed the position of Athletic Director/Head Football Coach as one position.

(16) Ms. Simmons had not, prior to 1976, held a position of, or similar to that of, Athletic Director/Head Football Coach in the Camden County School District. Additionally, there was no evidence that she was qualified to coach football.

(17) Ms. Simmons filed a sex discrimination complaint with the Office for Civil Rights of the Department of Health, Education and Welfare, dated May 27, 1976, pursuant to Title IX of the Education Amendments of 1972, charging the Camden County School District with discrimination on account of sex in failing to promote her. She later amended her complaint, alleging discrimi-

nation on account of her race.

(18) Thomas Baker was first employed by the Camden County Board of Education in 1967 as an English teacher. He received his teaching degree from Tuskegee Institute, Alabama, and completed thirty-six hours toward a Master's Degree at Florida A&M University. From time to time, before the events underlying this complaint, Mr. Thomas Baker had received periodic commendations from the Accreditation Committee and from Mr. Peter Baker, his principal and brother, and from the Superintendent.

(19) The evidence established that numerous complaints regarding Thomas Baker's teaching methods were received in late 1974 by the Camden High School administrators. These complaints arose from parents of students attending Mr. Thomas Baker's classes. His Vice

Principal, James Reeder, referred these complaints to the Superintendent since the parents felt that Principal Peter Baker would not be responsive to their complaints.

(20) Superintendent Rainer referred the complaints to Mr. Peter Baker, the Principal, and these two men, along with Mr. James Reeder, then conferred with Thomas Baker about how his teaching methods could be improved.

(21) Pursuant to Title 20-2, Sections 790 and following, of the Official Code of Georgia, the Georgia State Professional Practices Commission is a statutorily created body with the function of supervising the teaching profession in this State. The Commission is empowered to conduct investigations and hearings concerning alleged violations of the standards of

performance and the code of ethics of teachers in the Georgia system. Based on its findings in any particular case, the Commission may furnish to the local or State School Boards findings of fact and conclusions of law or recommendations, and the Commission is authorized to provide consulting services to the local school districts to promote improvement of the teaching profession.

(22) At the Camden School District's request, a three-man team from the Professional Practices Commission came to Camden High and performed a three-day review of Thomas Baker's teaching. The Commission recommended that Mr. Thomas Baker be required a "period of assistance" and suggested numerous remedial measures for Mr. Baker's use in improving his teaching.

(23) No subsequent evaluations were

made of Thomas Baker in 1975, and he was extended a new contract at the end of the 1975-76 teaching year for the ensuing scholastic year.

(24) On July 7, 1976, and on September 6, 1976, Mr. Thomas Baker filed complaints with the Office for Civil Rights of the United States Department of Health, Education and Welfare, alleging race discrimination under Title VI of the Civil Rights Act of 1964. He alleged, further, that black students were discriminatorily being tracked into lower ability groups and into Title I classes, and that black teachers and administrators were discriminated against in employment -- that is, in hiring, promotions, and firings -- and that the school buses were segregated by race. Now, twelve other black teachers purportedly signed the complaint but

their identities were not made known to the Superintendent until 1981. Mr. Thomas Baker initiated and authored the complaint and indicated to HEW that he was the spokesman for the other teachers who signed the complaint. He was, in fact, the contact person for an investigation by HEW pursuant to the complaint that commenced on-site in October of 1976.

(25) On August 26, 1976, Mr. Peter Baker filed a complaint with HEW in which he alleged discriminatory acts on the part of the Camden County School District. Those claims included allegations of discrimination in salary, intimidation, and harassment by Baker's employer, and the derogation of Mr. Baker's authority as Principal of Camden High, and general discrimination in the provision of working conditions.

(26) An HEW investigative team came to Camden High to investigate these charges in October of 1976. They were denied access to the faculty and files during school hours by the Superintendent. In addition, the Superintendent attempted to discover the identity of the complainants so that he could properly evaluate their claim.

(27) After HEW's first on-site investigation, Peter Baker and Superintendent Rainer resolved their differences, and in May of 1977, Mr. Peter Baker informed HEW that he wished to withdraw all of his allegations except one concerning salary, informing HEW that he had not been harassed by Defendant Rainer after October of 1976, and claiming that his working relationship with the Superintendent had improved.

(28) Mr. Rainer, the Superintendent,

knew in December of 1976 that Thomas Baker had filed the HEW complaint, and he could have known that Ms. Simmons had filed a complaint, although he testified that he, in fact, did not know.

(29) Plaintiff Gertie Simmons executed her contract for the 1976-77 school year and returned it to the School District without comment prior to May of 1976, even though the contract disclosed that she was not re-assigned the position of Cheerleader Sponsor nor to receive the supplement for that position.

(30) In the Fall of 1976, problems arose with respect to the teaching methods and performance of Gertie Simmons and Thomas Baker. Specifically, these Plaintiffs were observed arriving late for their classes, leaving their classes unattended to socialize with each other and other faculty members, not maintain-

ing proper control over their students, and failing to prepare and follow mandatory short- and long-term lesson plans. Their Principal, Peter Baker, also received complaints from parents and students as to the Plaintiffs' poor conduct.

(31) The Defendant Peter Baker attempted at numerous times during the Fall of 1976 to discuss these deficiencies in the Plaintiffs' performance as teachers with them. Thomas Baker responded to his brother's attempts with increasing resistance, finally refusing to accept further directions from his Principal and brother, Mr. Peter Baker.

(32) Subsequent to Mr. Peter Baker's conferences with the Plaintiffs concerning their deficiencies, several memoranda were published and distributed to all of the teachers in the Camden County High

School, advising them as to requirements concerning timeliness, attendance, and other school procedures to be followed.

(33) Because of the aggravated and uncooperative behavior of the Plaintiffs, Defendant Peter Baker felt that his authority as Prinicpal of Camden High was being eroded. In an effort to obtain an objective opinion of Plaintiffs' teaching abilities, Mr. Peter Baker called on the District Curriculum Director, Geraldine Walker, to make in-class observations and evaluate the teaching of Thomas Baker and Gertie Simmons. These observations took place on January 11th and February 7th of 1977. Geraldine Walker confirmed Peter Baker's findings.

(34) After visiting Mr. Thomas Baker's class, Mrs. Walker was accosted in the hall by Baker and questioned in a highly hostile and unprofessional manner

in the presence of students.

(35) On February 8th, 1977, Mr. Peter Baker wrote two letters to the Superintendent requesting that Gertie Simmons and Thomas Baker be relieved of their duties at Camden County High School. The grounds for the recommended terminaitons were Simmons' and Baker's refusal to "work cooperatively with their supervisors" and their open defiance of Principal Peter Baker's authority. Mr. Peter Baker recommended their dismissal since he could no longer work and operate as an effective principal with these two Plaintiffs on his faculty. Superintendent Rainer, after requesting Mr. Peter Baker to give serious thought to his recommendations and later receiving their confirmation, accepted Mr. Peter Baker's recommendation.

(36) On February 11th, the Superin-

tendent sent to Gertie Simmons and Thomas Baker letters officially notifying them that they were suspended from their teaching duties effective at the close of the school day, February 11th, 1977. The letter noted that the suspensions would extend through February 25th and that, prior to that time, the teachers would be afforded a hearing before the Camden County Board of Education or some other impartial tribunal. The letter also enumerated the grounds for the suspensions, including charges of insubordination and allegations of willful neglect of duties. The letters also contained the names of the witnesses who would appear for the School District and, in substance, stated what evidence would be allowed at the hearing.

(37) The charges upon which Mr. Thomas Baker's suspension was based were

amended in a letter from Mr. Rainer on March 22, 1977, also informing him that the charges would be heard by the State Professional Practices Commission beginning on April 25th.

(38) That Commission conducted its hearings on Mr. Thomas Baker's proposed termination beginning April 25th, continuing the 26th and 27th, and later on, May 23rd, finally concluding those hearings on September 14, 1977.

(39) As to charges of willful neglect of his duties, the Professional Practices Commission hearing examiner found that Mr. Thomas Baker had (1) failed to improve his teaching methods despite numerous efforts by school administrators to assist him, to the extent that little, if any, teaching was occurring in Baker's classes by February of 1977; (2) that Baker had failed to

abide by specific work day schedules; (3) that Baker had failed to sign on to work in the mornings in direct defiance of Camden High School administrative directives; (4) that Baker had left his classroom and students unattended and unsupervised for varying lengths of time, despite directives forbidding such behavior; and (5) that Baker had spent class time socializing with other faculty and staff. Other charges made by the School District were found unsupported by the evidence. The Professional Practices Commission concluded that, "Respondent" -- that is, Mr. Thomas Baker -- "willfully neglected his duties of improving his teaching methods, providing competent teaching in his classrooms, reporting to work on time, signing in prior to the designated time, and attending his students during the assigned classroom

periods."

(40) The Professional Practices Commission also concluded that Mr. Thomas Baker had wrongfully used school Xerox facilities and had accosted his immediate superior, Geraldine Walker, in a hostile and unprofessional manner following her visit to Baker's classes on February 7th of 1977.

(41) These findings of fact were held by the Commission to constitute adequate grounds under Georgia Code Annotated -- that is, the previous code -- Section 32-2101(c)(a) for the suspension and termination of Thomas Baker. On November 8th, 1977, the Professional Practices Commission accordingly recommended affirmance of the Camden County School District's decision to suspend and terminate Baker.

(42) In a letter dated March 18,

1977, the Camden County Board of Education notified Plaintiff Gertie Simmons that charges against her would be heard before a panel of the Professional Practices Commission. That hearing was held on September 16th and 17th of 1977.

(43) At these hearings, both Plaintiffs were represented by counsel.

(44) With respect to Ms. Simmons, the Professional Practices Commission found as a matter of fact (1) that Gertie Simmons had been insubordinate in the conduct of her classes in a manner contrary to administrative directives; (2) that Gertie Simmons had failed to report to work on time on numerous occasions in defiance of administrative requirements; (3) that Ms. Simmons had left her classes unattended for varying lengths of time and to socialize with other people while on class time; (4)

that Ms. Simmons failed to file lesson plans for her classes.

(45) These findings of fact were held by the Commission to constitute valid grounds for dismissal under Georgia Code Section 32-2101(c)(a); so that on November 8th, 1977, the Commission recommended affirmance of Gertie Simmons' suspension and termination from the Camden County High School. The Camden County Board of Education adopted these recommendations.

(46) The Plaintiffs -- that is, Mr. Thomas Baker and Ms. Gertie Simmons -- both appealed the findings of the Professional Practices Commission to the State Board of Education, as provided by State law.

(47) On May 11th, 1978, the State Board of Education affirmed the findings of the Professional Practices Commission

as to the terminations of both Gertie Simmons and Thomas Baker, and in its order, the State Board concluded that, "Appellants' consistent disregard of the Principal's directives appears to be the overriding motivating factor for the dismissal." And it concluded further that there was ample evidence presented to support the termination.

(48) The State Board also concluded that the evidence contained in the hearing record did not establish that the discharge was politically or racially motivated.

(49) The State Board, therefore, affirmed the decision of the Camden County Board of Education to suspend and terminate both Plaintiffs from their positions at the Camden County High School.

(50) At trial before this Court, the

Plaintiffs have produced evidence of numerous, specific acts of misbehavior or malfeasance on the part of other teachers at Camden High, similar in nature to the acts for which the Plaintiffs were discharged, which received more lenient disciplinary treatment from Camden County High School administrators than did Simmons and Baker. However, none of them were cumulatively as serious as the infractions committed by both Plaintiffs.

(51) In April of 1977, Mr. Peter Baker was given a 12.4 percent raise for the ensuing year, as the sole high school principal in Camden County, because of a State policy requiring a principal to be paid in excess of any subordinate. One of his subordinates, because of longevity and merit increase mandated by State regulation, had his salary increased, requiring that Mr. Peter Baker's salary

be raised so that it would be in excess of that particular subordinate. The raise was not in any way related to Mr. Peter Baker's actions against the Plaintiffs or his filing, and later dismissal, of any complaints before HEW.

(52) Complaints pursuant to Title IX -- that is, 20 United States Code, Section 1681 and following -- were filed before the United States Board of Education claiming that the dismissals of Simmons and Baker were retaliatory, in violation of the law, and seeking termination of Federal financial assistance to Camden County until the Plaintiffs were re-hired and made whole. After extensive hearings before an administrative law judge, at which the Commission was represented by counsel, it was recommended on September the 14th, 1981, that the allegations of retaliation

against Plaintiffs, whether having made complaints to the Office for Civil Rights or the Department of Education of racial and sexual discrimination, be dismissed as unproven, and these findings were not appealed.

(53) The administrative law judge concluded that, in filing these complaints with HEW, both Simmons and Baker had engaged in activity protected by the Civil Rights laws and that the proximity of their discharge to the filing of their HEW complaints created the inference that their discharges were retaliatory. However, the administrative law judge concluded on the evidence presented before him that there was no causal connection or nexus between the Plaintiffs' filing of the HEW actions and their termination. Instead, the administrative law judge found that the reason

for the discharge of Simmons and Baker was their willful neglect of their teaching duties and their defiance of Principal Peter Baker's attempts to supervise Camden County High School. The administrative law judge, thereafter, recommended that Plaintiffs' charges of retaliatory discharge be dismissed. Based upon the evidence produced before this Court, a similar conclusion is warranted. In fact, the Court concludes that these terminations were neither racially nor sexually motivated, nor motivated because of retaliation in any way for the filing of the Civil Rights complaints by the Plaintiffs.

CONCLUSIONS OF LAW

(1) In these proceedings, the Plaintiffs have the initial burden of establishing a prima facie case of discrimination. McDonnell Douglas

Corporation against Green, 411 U.S. 792: "The defendant then has the burden to articulate a legitimate, non-discriminatory reason for the suspension and ultimate termination of the plaintiff." Texas Department of Community Affairs versus Burdine, 450 U.S. 248: "Then if the defendant articulates such reasons, the burden then shifts again to the plaintiff to show that defendant's reason, or reasons, for terminating their employment are mere pretext or retaliatory action." In addition to the McDonnell Douglas and Burdine decision, see also Whatley against the Metropolitan Atlanta Rapid Transit Authority, 623 F.2d 1325.

(2) To establish a prima facie case of retaliation for opposing any practice made unlawful under Title VII of the Civil Rights Act of 1964, a plaintiff

must first show that he or she opposed unlawful discriminatory practices committed by an employer. The appropriate clause of Title VII provides, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment because he has opposed any practice made an unlawful employment practice by this sub-chapter." That is 42 United States Code, Section 2000e-3(a).

(3) The Plaintiffs must establish (1) a statutorily protected expression; (2) an adverse employment action; and (3) a causal link between the protected expression and the adverse action. See Smalley versus City of Eatonville, 640 F.2d 765; Whatley versus the Department of Education, 673 F.2d 873 (Fifth Circuit Unit B); and Payne against McLemore's

Wholesale and Retail Stores, 654 F.2d 1130.

(4) Statutorily protected expression must be established by a showing that the plaintiffs participated in conduct in opposition to an unlawful employment practice of the employer. Filing a charge with another federal agency which investigates and seeks remedies for employers' racial or sexually discriminatory practices is protected activity within the meaning of this provision.

(5) To establish a prima facie case of retaliation, it is required that a plaintiff prove discriminatory conduct and that the plaintiff held a reasonable belief that the employer engaged in discriminatory conduct.

(6) The Court concludes as a matter of law that, although the Plaintiffs successfully established a prima facie

case for retaliatory discharge in the case, the Defendants successfully rebutted Plaintiffs' allegations by articulating a legitimate, non-discriminatory reason for the suspension and ultimate termination of the Plaintiffs.

(7) Plaintiffs have failed to show by a preponderance of the evidence that Defendants' reasons for discharging the Plaintiffs were pretextual, and the Court must, thus, conclude that the suspensions and terminations of Gertie Simmons and Thomas Baker were not made in retaliation for their filing of Civil Rights actions with HEW and were not made for racial or sexual reasons.

(8) The Court concludes as a matter of law that the Defendants have not violated the provisions of Title VII -- that is, 42 U.S.C. Section 2000e(3) -- and are not liable to Plaintiffs for

relief in any form under that particular Act.

(9) The Camden County School District was one of eighty-one school districts in the State of Georgia that were ordered to commence an overdue and more effective plan for desegregation and to do so at once. That was U.S. -v- Georgia, 428 F.2d 377. As a result, the Camden County School District became subject to the standards for desegregation formulated by the Fifth Circuit in the case of Singleton against Jackson Municipal Separate School District, 419 F.2d 1211, 396 U.S. 290, and 425 F.2d 1211.

(10) The requirements of Singleton include that (1) any demotion or dismissal resulting from the desegregation project should be objectively determined and be done on a non-discrimi-

natory basis. If any such dismissal or demotion should occur, a vacancy later occurring must be offered to any qualified staff member of the same race; (2) that any dismissal or demotion shall be effected only upon written, objective criteria, with a written evaluation of the employee; (3) that a demotion includes any reassignment with less pay or responsibility, with a lower level of skill, or with different skills from those for which the employee is trained.

(11) Before the Camden County School District was integrated pursuant to Court Order in 1970 and 1971, Ms. Simmons held the position in the all-black school of girls' basketball coach, and she also performed any other duties and responsibilities of the head basketball coach, including scheduling all basketball games, both for girls' and boys' teams,

as well as arranging for referees and fixing the schedules of games with other schools for boys' and girls' teams.

(12) Although Ms. Simmons' pay was not reduced as a result of desegregation, her responsibilities changed from those primarily of a coach of interschool competitive sports to intraschool physical education, sports, and classes.

(13) The position of Athletic Director/Head Football Coach of Camden County High became vacant in the Spring of 1976, and she was not notified of that opening and offered the position of Athletic Director.

(14) The Court concludes as a matter of law that the Defendants were not obligated under Singleton to offer the position of Athletic Director/Head Football Coach to Gertie Simmons. Although perhaps minimally qualified for

portions of the position, Simmons has failed to show that the position of Athletic Director is a position separate and distinct from the job of Athletic Director/Head Football Coach. She was clearly not qualified for the position of Athletic Director/Head Football Coach.

(15) Accordingly, the Court concludes as a matter of law that Defendants have not violated the court order in Singleton and cannot be held liable to Plaintiff Simmons for relief in any form. In sum, I was impressed, and substantially agree in part, with the conclusions stated by the administrative law judge in the proceeding before the United States Board of Education, appearing on page ten of his initial findings, in which he said:

"This proceeding is not one to determine whether the underlying

complaints of racial and sexual discrimination were valid, whether the involved teachers were competent, or whether their conduct was such as to warrant dismissal. The purpose of this hearing is solely to determine whether or not the dismissals were at all retaliatory, and I specifically find that the suspension and termination of these teachers was not planned or accomplished as retaliation for their filing of complaints with the Office for Civil Rights. Had I discovered sufficient evidence to sustain such a finding, I would have had no compunction in so stating and ordering that Federal financial assistance be terminated until the teachers were reinstated and made whole. Rather" -- and with this, I agree -- "I find that whether the

the cause was just or unjust, proper or improper, the termination of these teachers was motivated neither by racial or sexual discrimination, nor in retaliation for their having made complaints as to racial or sexual discrimination."

So let a judgment be entered dismissing the complaints with prejudice. Are there any other findings that need to be made? All right, sir, that is the judgment.

END OF FINDINGS OF FACT AND CONCLUSIONS OF LAW.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit upon the person indicated below, said person being counsel of record for all Respondents, by depositing the same in the United States mails, first-class postage pre-paid, addressed to the following:

Mr. John J. Ossick, Jr.
Ossick & Taylor, P.C.
230 S. Lee Street
Post Office Box 1087
Kingsland, GA 31540

This 23rd day of September, 1985.

Christopher Coates

CHRISTOPHER COATES

Supreme Court, U.S.
FILED
OCT 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-510

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

GERTIE SIMMONS and THOMAS BAKER,
Petitioners,

v.

THE CAMDEN COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Petitioners brought their employment discrimination case contending that their suspensions and terminations from employment as teachers in the Camden County School District were in retaliation for their having filed employment discrimination complaints with various federal agencies. The Respondents denied the retaliatory motivation charges and presented evidence at the Bench Trial of the Petitioners' unsatisfactory professional conduct and performance in their jobs. The District Court recognized that the Petitioners produced evidence of numerous specific acts of misbehavior or malfeasance on the part of other teachers employed by the Respondents,

similar in nature to the acts for which the Petitioners were discharged which received more lenient disciplinary treatment than the Petitioners. However, the District Court further found that none of this misconduct was cumulatively as serious as the infractions committed by both Petitioners.[1]

In affirming the District Court the Court of Appeals concluded that the lower Court had accepted the Respondents' testimony that the suspensions and discharges were because their infractions were perceived to be part of an ongoing pattern of conduct manifesting disrespect and open defiance of supervisory authority. *Simmons v. Camden County Board of Education*, 757 F.2d 1187 (11th Cir. 1985) at 1189. Further, the Appellate Court found that the burden of proof had been properly allocated by the District Court in accordance with *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

REASONS FOR DENYING THE WRIT

The ruling of the Court of Appeals is not in conflict with the ruling of this Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). The evidence as found by the District Court in the present case was distinguishable from the situation in *McDonnell Douglas* in that the present case did not involve substantial direct evidence of discrimination in connection with the suspensions and terminations, as in the present action there was only circumstantial evidence of retaliation. *Simmons*, 757 F.2d 1189. In the present action the District Court had specifically found that while there was misconduct on the part of other employees it was not of the same level of seriousness as the misconduct of the Petitioners.[2]

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[1] The Opinion of the United States District Court was filed with the United States Supreme Court on September 23, 1985 and attached as an appendix to the Petition for Writ of Certiorari.

[2] The Opinion of the United States District Court was filed with the United States Supreme Court on September 23, 1985 and attached as an appendix to the Petition for Writ of Certiorari.

Further, the Court of Appeals recognized that while a retaliatory discharge case under Section 704(a) of Title VII can be made where there is no direct evidence of retaliation, the Petitioners could make out a prima facie case by establishing (1) that there was a statutorily protected participation, (2) that an adverse employment action occurred, and (3) that there was a causal link between the participation in the adverse employment action. *Whatley v. Metropolitan Atlanta Rapid Transit Authority*, 632 F.2d 1324 (5th Cir., Unit B, 1980). However, this means that the causal link connection does not rise to the level of direct evidence which would have caused a shift in the burden of persuasion to the Defendant. Since this direct evidence was not established, the lower Court was proper in applying *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

CONCLUSION

Since the District Court properly concluded that the Petitioners failed to meet the burden of overcoming the legitimate reasons articulated by the Respondents in a situation in which there was not substantial direct evidence of discrimination affecting an employment decision, the allocation of proof prescribed in *McDonnell Douglas* and *Burdine* was proper and the writ should be denied.

Respectfully submitted,

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